IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 46

UNITED STATES OF AMERICA,

Appellant,

v.

GENERAL MOTORS CORPORATION; LOSOR CHEVROLET DEALERS ASSOCIATION; DEALERS' SERVICE, INC.; AND FOOTHILL CHEVROLET DEALERS ASSOCIATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE O. M. SCOTT & SONS COMPANY, BROYHILL FURNITURE FACTORIES, CHAMPION SPARK PLUG COMPANY, JOCKEY MENSWEAR, A DIVISION OF COOPER'S, INC., PALM BEACH COMPANY, RUST-OLEUM CORPORATION, UNION UNDERWEAR COMPANY, INC. AND WOLVERINE SHOE & TANNING CORPORATION, AS *AMICI CURIAE*

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Appellees.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The O. M. Scott & Sons Company, Broyhill Furniture Factories, Champion Spark Plug Company, Jockey Menswear, a division of Cooper's, Inc., Palm Beach Company, Rust-Oleum Corporation, Union Underwear Company, Inc. and Wolverine Shoe & Tanning Corporation hereby respectfully move the Court for leave to file a Brief *Amicus Curiae* in support of the decision of the District Court. The parties have withheld consent to the filing of such brief. Copies of this Motion and the attached Brief have been sent to the Solicitor General and to the Appellees.

The companies joining together for the purpose of submitting this Motion For Leave To File a Brief *Amicus Curiae* are each in the business of making and selling consumer goods bearing the brand name of the maker. Each company is a small to medium sized manufacturer who believes that they know best how their products should be distributed, and who are gravely concerned about the possible impact and effect of the decision of this Court; for the reason that this case presents to the Court a mandate to consider the legality of a controlled distribution pattern, the need therefor, and its functioning in the public interest.

It is acknowledged that Appellees are well-represented and are able to defend their own marketing practices before this Court. This Motion, although made *pro forma* in support of the positions asserted by Appellees, is believed necessary by the *Amici Curiae* in part because of the breadth and scope of the ruling sought by the Government, a ruling that could have decided adverse impact on the distribution practices of thousands of independent trademark owners whose business postures are wholly dissimilar to that of Appellee, General Motors Corporation.

In addition, the *Amici Curiae,* acting in their own interest, want to call to the Court's attention certain highly relevant legal issues and possible positions in respect thereto that are not urged by the parties to the litigation. These include a separate legal position in respect to the issue of "sales to" as opposed to "sales through" discount houses; a discussion of a trademark owner's necessary interest in the distribu-

tion process; and a third view of the role of the "effect on price" and its relationship to the issues herein.

Appellee General Motors Corporation itself constitutes a major segment of a unique and extraordinary industry. The economic concentration at the producer level, the near-exclusive use of franchised dealers as retail outlets and the existence of special legislation all tend to make atypical the context of the distribution problem involved herein. The movants, representing highly fragmented, non-concentrated industries, which are the more common situation in the economy as a whole, feel that they are better situated to urge the economic interests of small and medium size industries as to the basic issues before the Court.

The decision in this case may well affect distribution practices throughout commerce. The differences between other lines of commerce and the unique practices in the industry before the Court may be crucial to the determination of the issues involved herein. Therefore this Brief *Amicus Curiae* is in part a plea to the Court by responsible representatives of the affected business community for the Court to fashion a rule in this case with scrupulous care for the proper interests of all business. Movants seek an opportunity to present their views and positions solely in order to aid the Court in arriving at a decision which will be sound for business as a whole.

For these reasons and for the additional reasons set forth in the accompanying brief, movants respect-

fully request the Court's leave to file the accompanying Brief *Amicus Curiae.*

Respectfully submitted,

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Interest of the *Amici Curiae* and Statement

This litigation puts in issue the question of the legality of a business practice that is fundamental to the marketing and distribution patterns of a broad spectrum of businesses throughout the nation. The *amici curiae* are members of an unincorporated and informal organization named the Committee On Distribution Rights. The membership of the Committee

On Distribution Rights constitutes a small cross-section of producers of branded consumer goods who employ conditions, restrictions and limitations in respect to the distribution of their products.

Each of the *amici curiae* is a member of the Committee On Distribution Rights. Each of the *amici curiae* utilizes in variant forms, conditions and limitations in their dealings with their customers, who are wholesalers or retailers of the products of the *amici curiae,* such conditions or limitations having similar or analogous purposes and effects as the condition or restriction challenged here.

This case involves two alternative legal theories on which the liability of Appellees to antitrust charges may be justified. It is the first theory, the provision in the General Motors franchise agreement, that is of grave concern to the *amici curiae.* The provision in the General Motors franchise is to the effect that the buyers, who are franchised dealers in Chevrolet automobiles, will not open branch outlets for the sale of Chevrolet automobiles without the prior approval of General Motors. This provision operates so as to give the seller a decisive role in the determination of the number and location of dealers in his products.

This Brief *Amicus Curiae* is limited to the question of the legality under Section 1 of the Sherman Act of this and similar provisions that have the effect of permitting the seller to choose the number, identity and location of the putative resellers of their products.

The second theory offered to the Court is that of a conventional conspiracy between and among franchised dealers in Chevrolet automobiles in the Southern California market to induce one another to

refrain from using discount houses as *de facto* branch outlets for Chevrolets. It has been long established that a concerted refusal to deal is in the nature of a boycott and is to be judged by boycott standards as a *per se* antitrust offense. It is claimed by the Government that General Motors was a party to this conspiracy among and between its franchised Chevrolet dealers. The *amici curiae* have no interest in this aspect of this appeal, therefore this brief is not concerned with and does not discuss this alternative theory of dealer conspiracy.

The question of great moment to the *amici curiae* is: to what extent may trademark owners contract with their customers relating to the business activities of their customers as affecting the resale of the suppliers' trademarked products? There is another and even more serious question implicit in these proceedings as to the *amici curiae,* namely may a seller refuse to continue dealing with those customers who fail to conform to the conditions, restrictions or limitations that are required by the seller?

The only effective sanction possessed by trademark owners that may be utilized to inhibit the post-acquisition activities of the buyer is that of a subsequent refusal to deal. At the outset, it should be noted that this sanction is reciprocal and is equally potent in each instance as a negotiating weapon of the buyer.

Therefore, as the respective businesses of the *amici curiae* are in part structured upon limitations as to the distribution of their products and because the only meaningful enforcement of such limitations is the unfettered privilege of withdrawal from the rela-

tionship when it proves unsatisfactory, the substance of this appeal as it relates to these issues has a fundamental significance to the businesses of the *amici curiae*.

In addition one of the litigants before the Court—General Motors—is peculiarly unsuited to plead on behalf of small scale enterprise and the importance of preserving conditions to encourage ease of market entry. The position of General Motors as one of the world's largest corporations induces the *amici curiae* to believe that they are better situated to discuss and explain the essentiality of the contractual limitation in question, as their business situations are more normal and typical. Additionally, General Motors' freedom to terminate further business dealings with its customers has been significantly limited by the Automobile Dealers Day In Court Act, 15 USC 1221, which is itself altogether atypical and unique.

Finally, the *amici curiae* are alarmed lest the Court annunciate an overly broad rule that could be applied to unduly limit the options of a seller as to the distribution of his products, such rule being promulgated in the unfavorable context of this litigation, and without adequate and independent consideration afforded trademark owners who are in totally dissimilar commercial situations as compared to that disclosed by the record in this case.

For this reason, the *amici curiae* urge the Court to consider and determine the legality of the dealer location clause favorably as to Appellees, or in the alternative, to treat the industry before the Court as *sui generis* and limit the Court's decision specifically to the competitive realities of the automobile industry.

Summary of the Argument

1. The enforcement of General Motors' dealer location clause, in which dealers covenant to refrain from opening or doing business through branch sales offices without General Motors' approval, enforced by General Motors to inhibit sales through discount houses, does not violate Section 1 of the Sherman Act. The dealer location clause and the enforcement thereof in the facts of this case are inseparable. The legality of the clause is consistent with the operation of the Automobile Dealers' Day In Court Act.

2. The nature and marketing dynamics of a trademarked product give rise to a lawful interest in the trademark owner in respect to the entire distribution process. The interest is essential to protect the good will of the trademark owner. The restriction challenged here is a necessary ancillary restriction to the distribution of trademarked products, and the public interest is served and protected by permitting the trademark owner to channel the distribution of his products.

3. This is not a price-fixing case, whether or not the dealer location clause may properly be said to have an "effect on price". The "effect on price" issue is present here only by means of an improper inference, but, in any event, it should not be used as the legal equivalent of proscribed vertical price-fixing to reach a result of illegality in the application of the dealer location clause.

4. As recognized in the *White Motor* case, vertical covenants cannot be equated to horizontal conspiracies

between competitors for the reason that the buyer-seller relationship involves different economic considerations. Covenants ancillary to the sale and distribution of trademarked products are supported by precedent and are altogether consistent with the public interest.

5. The Automobile Dealers' Day In Court Act and the legislative history of related bills seem to sanction and approve the dealer location clause. Informed Congressional opinion appears contrary to the legal position urged by Appellant.

6. In any event, the economics of automobile marketing are such as to suggest that any restrictive rule adopted or implicit in the decision of the Court should be limited to the industry and economic specifics thereof.

ARGUMENT

I.

The contractual restriction and the Government's theory of illegality.

It makes little difference whether the contract clause attacked here is denominated a "restriction" or any other term, provided that the label employed does not obscure the reality of that which is being decided. The *amici curiae* favor the term "limitation" as a more neutral designation, one not embodying a prejudgment of illegality, as the issue involved is alto-

gether too vital to be resolved by a superficial exercise in semantics.[1]

The specific contract clause in issue is as follows:

> Once Dealer is established in facilities and at a location mutually satisfactory to Dealer and Chevrolet, Dealer will not move to or establish a new or different location, branch sales office, branch service station, or place of business including any used car and/or truck lot or location without the prior written approval of Chevrolet. (R. 578.)

For the purposes of this brief this clause will be referred to as the "dealer location clause". There is no ambiguity about its operation, purpose or intent. It arms the seller—General Motors—with the power to limit, and thereby control, the number and location of retail outlets for new Chevrolet Automobiles with which General Motors will do business. It does not operate in an absolute sense, as a non-customer of General Motors may purchase Chevrolets without limit from franchised dealers for the purpose of resale.

The single question of significance to the *amici curiae* in this case is the legality of the dealer location

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[1] Far too often, antitrust practitioners, on both sides of the fence, bandy about slogans and shibboleths in substitution for hard, practical and dispassionate analysis. Expertise in antitrust, on both sides of the fence, should consist of more than a mastery of its dictionary of cliches and catchwords. Surely, reliance upon verbalism is most inappropriate—if not disastrous—when one deals with fundamental questions touching the structure and performance of the nation's economy." "PETRIFIED OPINIONS" AND COMPETITIVE REALITIES, Address by Philip Elman, Federal Trade Commissioner, before the First Annual Antitrust Institute, Pittsburgh, Pennsylvania, November 5, 1965.

clause as between seller and buyer. If the dealer location clause is lawful, then it must follow that the implementation and enforcement thereof between the parties by lawful means is also outside the ban of the Sherman Act. It would also seem that such lawful means may range from persuasion and admonition all the way to the actual termination by the seller of its business relationship with a non-complying buyer.

The General Motors dealer location clause is one of a large variety of limiting or restricting arrangements between seller and buyer, operating to make effective the seller's control over the number, location, economic function, or other pertinent qualifications of the buyer. For example, a contractual commitment limiting the buyer to the retail function only is commonplace, especially as to sellers who perform their own wholesaling function by selling directly to retailers. It could conceivably be argued that the General Motors dealer location clause also acts as a customer allocation arrangement, as it limits the dealer to selling to those consumers who are available to and willing to trade at the dealer's authorized place of business. Thus it is difficult to conceive of proscribing the General Motors dealer location clause without at the same time affecting a diverse number of similar and analogous agreements conventionally employed by many sellers in industries characterized by fragmented competition at the producer level and subject to variables such as impulse or seasonal buying patterns, degrees of product essentiality and ephemeral consumer preferences.

In its brief the Government seems to avoid making a direct and ultimate attack on the General Motors

dealer location clause as such. Instead the Government urges that the application of the clause to prevent sales by dealers through discount houses is (1) not an essential interpretation and application, and (2) that such interpretation and enforcement of the dealer location clause was reluctantly undertaken by General Motors solely in response to dealer complaints.

It is respectfully submitted that the Government's attempts to distinguish on the facts the limitation on sales through discount houses from the underlying issue of the legality of the dealer location clause as such are without significance. It is manifestly irrelevant whether or not General Motors was logically compelled to apply the dealer location clause to the sales in question, for the reason that the interpretation was made in fact and enforcement followed. The dealer location clause and its application on the facts of this case stand as one before this Court.

Additionally, the logic of the Government's second factual distinction is not compelling. Although relevant to the conspiracy issue, the legality of the dealer location clause as such can hardly be said to turn on the identity of the party thereto who calls for its enforcement. It is unfortunate that the challenge to the legality of the clause in question is not presented to the Court squarely, but rather is raised by indirection and implication. What is absent in the Government's argument is any discussion of the utility, function and proper scope of limitations and restrictions within a given distribution system. Without this, how can one tell which are lawful and reasonable buyer-seller covenants and which are illegal?

By means of this litigation the Government has intervened in the business of automobile distribution on behalf of a group of California discount merchants. The Government speaks glowingly of their contribution in pioneering a new method of automobile distribution. The dealer location clause of the General Motors franchise agreement, valid for more than a quarter century, is to be eliminated to ensure a continuing supply of automobiles to discount houses. Thus the Department of Justice has chosen to act as an advocate for discount stores whose collective role herein is that of prosecution witness. The Government presents for this Court's determination a choice between two restrictions: Should General Motors be "free" to limit the sales of Chevrolet automobiles from approved locations, or should they be "restrained" by injunction from following this business practice? The dichotomy of restrictions may be expressed from the point of view of the dealers: Are franchised dealers to be "restricted" by contract with General Motors as to approved business locations? Or are the dealers to be "restricted" by injunction from so contracting with General Motors?

Viewing the controversy in terms of its specifics, it compels the Court to make a choice as between franchised Chevrolet dealers and discounters. The special significance of the Automobile Dealers Day In Court Act, *supra,* has a bearing on the choice to be made. The Automobile Dealers Day In Court Act was engrafted on the corpus of antitrust law and is an explicit recognition that an automobile dealer franchise is "something of value". Past abuses made necessary a Congressional mandate to afford the dealer a measure of security in his franchise, approaching that of

a property right. It is significant that this law was enacted over the opposition of the manufacturers, including Appellee, General Motors.

Now the Court is requested by the Government to sanction a device which will inevitably tend to dilute and destroy the "something of value" aspect of the franchise relationship by the simple expedient of prolification. Any one franchised dealer, reasons the Government, may open and maintain as many branch outlets or satellites as they choose and wherever they choose, without fear of restraint, interference or inhibition by the manufacturer. Among other things, promulgation of this rule would be in conflict with the purpose and functioning of the Automobile Dealers Day In Court Act and would be at variance with the philosophical and economic predicate of that legislation.

The parties have created a distinction in their briefs tendered to the Court on the jurisdictional issue concerning "sales to" as opposed to "sales through" discount houses. Appellee General Motors strenuously urges that the Court should not consider the legality of the clause challenged by the Government as if the clause operated to inhibit "sales to" discount houses; that the record in this case refers only to Appellee's administrative enforcement of its contractual clause in the situation where the offending dealers sold "through" a branch outlet—a discount house. In opposition, the Government urges that the legal form of the transaction is not determinative. Whether the sales that General Motors discouraged are "to" or "through" discount houses, the economic effect is to prevent discount houses from selling new Chevrolet automobiles.

The *amici curiae* urge a third position that the contractual clause limiting sales from approved locations is generally reasonable and perhaps necessary; that Appellee is entitled to enforce this aspect of the franchise relationship so as to effect the result which the Government describes as inimical to the public interest, and that the legality of the challenged clause does not and should not depend on the legal form employed, agency or sale, or on other technical niceties concerning transfer of title. *Simpson* v. *Union Oil Co.,* 377 U.S. 13.

In other words, the *amici curiae* urge the Court to decide the issue in favor of Appellee on the broad economic ground, namely that the producer of a trademarked item has a pervasive and proper interest in business and in law to select his own channels of distribution and to take such action (absent collusion) so as to make that selection effective.

II.

The trademark owner's interest in distribution is proper.

It is evident to most observers that the selling of goods to consumers by means of a trademark is quite different than the selling of unlabelled commodities such as wheat or cotton. The extreme view that the producer of a trademarked product has no proper interest in its distribution once it has been sold by the maker has not been generally accepted. In its brief the Government seems to avoid this extreme view by conceding that under some undefined circumstances,

restrictions on the conduct of the buyer might be lawful. However, the Government then goes on to urge that whenever the restriction or covenant being scrutinized can be said to have an effect on price, then the inquiry is over and that illegality has been demonstrated.

It is respectfully submitted that this argument is simply a disguised version of the extreme view that once title is passed, a trademark owner has no further lawful interest in the distribution of the trademarked product. The difficulty with the Government's reasoning is that any covenant—even an agreement by the buyer to pay the seller for the merchandise—is capable of being viewed as unlawful as having "an effect on price". Thus the Government's argument "proves too much", and is of little utility in distinguishing the lawful from that which is an unreasonable restraint of trade, *per se* or otherwise.

To be realistic about the substance of the problem of distinguishing the permissive from the proscribed within the ambit of a single vertical distribution system, it is necessary to accept the premise that a trademark owner does have some continuing interest in the marketing and distribution process that is independent of title and survives the passage thereof. A well known trademark is both the symbol and equivalent of the business itself. This is what consumer advertising is all about, surveys, sales strategy, demonstrators, promotional funds and a host of other viable tools and devices which are the very embodiment of the trademark owners interest in distribution. Marketing and production as they exist in the mid-Twentieth Century provide compelling support for the view that they are

a unitary, inter-related, inter-dependent and continuous process.

At some point in the process third parties intervene, normally independent retailers and wholesalers. Such an independent third party adopts and acquires the benefits of all that has gone before in the creation of the branded product and the consumer demand therefor, and proceeds to play his indispensable but interdependent role. As stated by this Court in *Old Dearborn Distributing Company* v. *Seagram Distillers Corp.,* 299 U.S. 143, the independent wholesaler or retailer buys only the physical product, thereby placing himself in the position to utilize for his own benefit the trademark and the good will of the trademark owner, in respect to which he has no ownership rights.

The rationale or raison d'être of buyer-seller covenants in the distributive process is two-fold. First, commitments are essential so that the function of each participant may be properly defined in order for the complex organization of production and distribution to function effectively. Second, to control the functioning of each participant including the independent wholesaler and retailer in such a way as to avoid injury and over-all detriment to the distribution part of the total process.

It simply will not do to attempt to fit modern commercial practices into the farmer—independent entrepreneur mold. Independent businessmen including wholesalers and retailers, should surely be permitted to preserve a maximum of independence and freedom of choice, but only up to that point where their activities tend to thwart and undermine the economic process that gives them sustenance.

The survival of most businesses has depended upon their ability to develop an adequate and properly functioning distribution system. Distribution in all its aspects is a most intricate, delicate, and complex subject; however, it is not proposed here to submit a treatise on distribution to the Court. Nevertheless, it should be noted that each finely attuned distribution mechanism was evolved on an enterprise-by-enterprise basis by innovators and risk-takers. There was and is no master plan. The development of a distribution system for a product has been a matter of trial-and-error experimentation, the object of which has been to make a success with the consumer.

In the process of devising a satisfactory distribution pattern for a consumer-pleasing product, the discipline has been that of the balance sheet. Mail order distribution filled a need in its day, it became an acceptable and even conventional method of selling and delivering goods at a profit. If either of these elements has been lacking, mail order distribution would have been a failure. These, then, are the twin pragmatics of the marketer: consumer favor, at a profit.

For the purposes of this litigation it is important to note that the development of distribution of trademark products was unattended by a large body of restrictive public regulation. The prohibitions that were imposed—and respected in the over-whelming number of cases—related almost wholly to collusive action between and among competitors. Banned were agreements to divide markets, allocate production, rig prices, and boycotts organized to deny to third parties access to the market place. The body of trade regulation law, with but one important exception, developed

altogether in the context of interbrand and intercompetitive arrangements, wherein rivals by agreement sought to adjust their differences. The exception to the above is the proscription in respect to resale price maintenance as contained in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373 and as further defined, limited and expanded in the oft-cited line of cases down to *U. S.* v. *Parke, Davis & Co.,* 362 U. S. 29. Other than the judicially imposed limitation as to resale price maintenance practices, the Antitrust laws had little application to the marketer developing a distribution system.[2]

The building of a consumer franchise with a novel and superior product gave the innovator—the creator—an expectancy of increased business for his "better mousetrap". The development of the law of trademarks is in effect legal recognition of the economic value created by a successful innovator. This value is conventionally described as good-will and it has seemed obvious that this should be the property of the creator thereof.

The very existence of trademarks brings into being new considerations, especially conditions affecting distribution. With a trademark the user, no matter how remote in the flow of the economic events of purchase-and-sale, can now identify the maker. And, being able to identify the maker, the consumer is then vested with the power to reward or punish the maker with precision, by granting or withholding further patronage, by espousing the maker's product to his

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[2] This is not to ignore the Clayton Act, 15 U.S.C. 12 et seq. However proof of a definite and adverse effect on competition has been a strictly observed condition to the operation of the original Clayton Act prohibitions.

neighbors, or by castigating the maker as the experience warrants. In this manner the operation of the supply and demand principle (for that maker's product) is affected. Another way of stating this is to say that each trademarked item creates its own separate supply and demand curve, because the trademark gives to each customer a precise and most effective "vote" as to the business future of each trademark owner.[3]

A trademark is used by its owner as a bid for a clientele, a consumer franchise, and whether that franchise is in robust or is in failing health is the matter of paramount concern to the trademark owner. The economics of the trademark system, the production of goods with the identifying symbol of the maker, arms the consumer with potent means for expression, and subjects the business future of the trademark owner to the whim and caprice of the consumer, as well as his indifference or even affirmative displeasure.[4]

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[3] Whether or not one approves of the existence of a consumer goods economy based on brand names is altogether irrelevant. As to those who feel that labelling by grade under public supervision affords the best system to assure consumer satisfaction, the current experience in Russia may provide unexpected illumination. Trademarks and the private ownership thereof seem to have emerged compulsively in an economic milieu that is otherwise hostile and seemingly totally opposed to the institutions of property, and the recognition of individual excellence that are the cornerstones of, and the essential preconditions for trademarks. It is now being demonstrated by the Communists themselves that trademarks, in all their private capital raiment, are in fact evolutionary imperatives in an economic sense—and the legal accommodation of trademarks has followed upon their emergence and use. M. I. Goldman, *Soviet Marketing*, Free Press of Glencoe, N.Y., 1960

[4] The law has not failed to recognize and give substance to the significance of the trademark owner's "signature", and the

It has been suggested by a major antitrust spokesman for the Government that "once a producer has sold a product for a price satisfactory to himself, he loses all further right to control its subsequent use and disposition in the hands of resellers."[5]

The difficulty with this superficially appealing and guileless pronouncement of distribution policy is that just the opposite of this is true, as a matter of business pragmatics. The producer of trademarked consumer goods must possess an enduring and intense interest in the entire marketing process as it relates to his trademarked product, or else disappear from the business scene.

A concern with and involvement in the entire mar-

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remote consumer's reliance thereon. *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 382 (1916), is an early example of the imposition of responsibility on the maker for the proper functioning of the product. The Uniform Sales Act, the Uniform Commercial Code, together with other state legislative enactments have expanded this exposure of the trademark owner to the claims of those far removed in the chain of title. This is directly relevant to General Motors' requirements that its dealers provide adequate service facilities to consumers.

[5] Address by Hon. Paul Rand Dixon, Chairman, F.T.C. to the National Electric Manufacturers Association, May 26, 1962:

It is not altogether clear whether these remarks were intended to be limited to efforts to control resale prices or were more general in intent. It is difficult to conceive that this expression of distribution economics was meant to be taken literally. Yet the constant reiteration of such views provides the impetus for the "shifting burden", discussed elsewhere herein, and this litigation is clearly an attempt by the government to vindicate this philosophy in the context of a conventional "location" clause in a contract. To paraphrase Mr. Dixon, the government position in this case is, "once General Motors has sold a Chevrolet to a franchised dealer, General Motors loses all further right or legal interest in that Chevrolet automobile. General Motors may not contract with its dealer that the Chevrolet shall be resold by the dealer only from the dealers present place of business. Each dealer must be free to open as many branch outlets as he chooses, and wherever he chooses."

keting process is not a matter of choice, it is rather an imperative. "Market your product successfully, or perish" is an all-pervasive mandate for the trademark owner. This is what national advertising is all about, in the aggregate it is simply one aspect of the trademark owners direct involvement in the marketing function, all the way to the ultimate level of the consumer.

Thus it simply does not square with the realities of business to suggest that the producer's interest ceases with the first sale; that once a producer divests himself of legal title to the product, then the subsequent commercial events are of no proper concern to him. The indisputable existence of such things as cooperative advertising, guarantees and warranties, demonstrators, push money, the fight for shelf space together with a host of similar practices involving the trademark owner in the specifics of distribution, makes it overwhelmingly clear that in reality the trademark owner is very deeply committed long after the point of the first sale. For the first sale is merely the beginning of the marketing process—the end of the process is a consumer.

The plain truth is that the marketing and distribution of a trademarked product simply cannot be left to happenstance. Any interpretation of law that looks in the direction of denying to the trademark owner a large stake and interest in his own distribution processes is in effect an attempt to nullify reality. Distribution is far too vital a matter to be left to the whims of strangers.

This litigation may well be determinative as to whether the law is to recognize and afford hospitable

scope to the rights and interests of a trademark o in the marketing of his own product. It is hi probable that this case will decide if the law sh forbid parties to contract between themselves as single element of the distribution formula, out myriad of possible elements, that of the business tion of the buyer who is party to the first sale. whole purpose of that first sale is to enable the b —the franchised dealer—to resell the Chevrolet mobile. The trademark owner has amply de strated its business interest by the inclusion o challenged location clause in its dealer contract 25 years, now as a matter of custom and conve At this point it seems illogical to inquire if this ness interest may be justified as a proper interes the reason that the interest exists—it antedate litigation by many years. It is rather correct quire: Do the interests of society now requir legal banishment of the dealer location clause? this question the government answers yes, offeri support argument and theoretical material only.

To this question appellees and *amici curiae* a no, the interests of society do not require the ne and outlawing of this element of business inte the location clause. Indeed, just the opposite is as it can be demonstrated that the location serves a salutary purpose, is altogether merit and perhaps, even essential. And although this has not hesitated to mandate a departure from lished conventions in the appropriate cases, even turning its own precedents in so doing, it is sub that this is a uniquely inappropriate case for departure. This is altogether a problem of sta interpretation, with the government urging a

construction and extension of the Sherman Act to forbid a business practice long held lawful. This litigation in fact involves but an economic tug-of-war between discounters—whose cause the Department of Justice supports—and franchised automobile dealers —whose economic well-being has been the subject of special Congressional concern in the Automobile Dealers' Day In Court Act, *supra.* All the phrases about the virtues of competition do not alter the reality that this Court is being requested, on a scant and uncertain record, to make a far-reaching economic judgment as between franchised automobile dealers and discounters. One or the other will prevail in this litigation.

Highly placed and renowned figures in the world of commerce have frequently given expression to the businessman's appraisal and evaluation of trademarks —their function and role.[6] The statements emphasize the enormous monetary value of a popular trademark, the trademark as a priceless asset. Unlike other assets, a trademark, being the symbol of an intangible, is relatively immune from fire, flood and certain other natural disasters and purely physical risks. At the same time, the trademark is always subject to unusual perils of a unique nature.

The whole development of the law relating to trademarks and unfair competition is of relatively recent origin, Callman, *Unfair Competition and Trademarks,* 2d Ed. (1950) and is primarily concerned with the protection of the trademark, as private property, from

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[6] See, for example, Hearings, Committee on Interstate and Foreign Commerce, U.S. Senate, 82nd Congress, 2d Session on H.R. 5767 (1952).

appropriation by strangers. It is not surprising that valuable property of any species should be subject to the risk of larceny, and the law painstakingly developed the special protection necessary for these symbols that embody and signify a most precious capital, goodwill. It is now well settled that the law of trademarks serves the functions of both protecting the public, and preserving intact the ownership rights in the trademark of the business whose reputation and goodwill the mark symbolizes.

From the practical point of view of the businessman, there are two interrelated features of his trademark that are of important and continuing significance. First, the trademark is his business identity, in the same manner as his signature on a will or a check signifies his identity as an individual. Second, the trademark both creates and contains the future expectancy of the business. As the trademark is the accumulated heritage of the past, it is also the promise of the tomorrow. Its possession affords the businessman all of the assurance he will ever have that he can anticipate future orders from satisfied customers.

Both of these ownership benefits of trademarks are intangibles, they exist only as special symbols in the general consciousness of their audiences. The use or harvesting of the commercial values of trademark symbols in a distribution process is often a delicate and tenuous affair, in respect to which a choice of marketing options often play a major role.

For example, the maker of a high-priced, premium quality brand of watches may want to have watches bearing his commercial identity exposed to the public

only in prestige retail situations. The trademark owner in this case is aware that the calibre of retail exposure is an important part of the "perceived value" of his trademarked watches. As part of his marketing strategy directed at consumers who are moved by status symbols, the trademark owner limits and confines his retail exposures to the few that seem to him to be appropriate. To deny him the option of making effective his selection of channels of distribution by enforceable covenant, such as in the General Motors dealer location clause, is to foreclose him from the privilege of employing his trademark as he deems to be in his best interest.

Would there be any off-setting social advantage in outlawing such trademark owner's "sales to consumers only—no wholesaling" restriction? It should be noted that the question is not whether the trademark owner is right or wrong as to his choice of marketing options, the consumer will inevitably make that decision. Of course, the more successful such marketing strategy becomes as a sales increasing device, the greater the pressure on the operation of the restrictive clause from those who wish to participate in the benefits of the successful trademark franchise—that which they neither created nor made contribution to as a risk-taker.

Now what if the trademark owner is convinced (rightly or wrongly) that the adding of dealers would dilute and diminish the value of his trademark—its currency in the trade or acceptance by consumers? Should the antitrust law be interpreted to compel the trademark owner to take this risk whenever his retailers violate the "no-wholesale" or "no branch

outlets" clause of their agreements with the trademark owner? Realistically, the only occasion for the occurrence of the problem is when the trademark owner is correct in his choice of marketing options of limiting or restricting his distribution. The antitrust rule surely should not be that the commercial success of the limiting device is also the measure of its illegality.

Finally, what are the permissive options of the trademark owner who has made a commercial success, in part by following a practice of limitation of retail outlets (by whatever form of contractual device) when confronted with a "volunteer" whose retail situation and practices affirmatively injure the carefully-created good will of the trademark owner? To pursue the hypothetical case of the maker of watches who succeeds because he sells only to a limited number of prestigious retail stores in each market, what lawful interest may he assert when "bargain basement" distribution occurs as a result of transshipping by retailers? Does national antitrust policy, intended to promote and enhance competition, compel the trademark owner in such circumstance to endure the destruction of the prestige image that has now become the very essence of the trademark?

There is very real concern among trademark owners that the above hypothetical case is in fact their legal position. *Parke-Davis* taught anew that a producer cannot conspire with his wholesalers as to its policy of retail price fixing, with this doctrine *amici curiae* are in full accord. But to extend this to variant forms of buyer-seller limitation on an "effect on price" theory brings into sharp question the very foundations of brand distribution as they now exist. The Govern-

ment's appeal to this Court is much more than a request that the Court elevate intra-brand competition as more important than that among rival brands, and the Government's economic position contains more than an implicit assumption that retailers are more important to the preservation of competition than are producers. In essence the Government's economic analysis of this automobile distribution case if accepted, and applied to trademark distribution generally, would be a mandate for far-reaching and unpredictable changes in the marketing of all branded products.

To summarize this portion of our brief, we submit the following essential propositions that bear upon the permissive nature of the dealer location clause in issue:

1. A trademark is an intangible asset of unique and irreplaceable value, and is "owned" by the creator thereof.

2. Property rights in trademarks are unusual in that they have no existence unless used in a buyer-seller distribution context.

3. The trademark owner retains an interest in his trademark that survives the passage of title to the goods; the purchaser of the goods acquires no rights in the trademark.

4. Under some circumstances a trademark can be used in the distribution process so as to dilute, disable and injure it, perhaps to the point of its destruction.

5. The owner of the trademark has a lawful interest in avoiding and preventing injury to his trademark by limiting its use to those whose use thereof is

beneficial, or at least non-detrimental, to the currency and value of the trademark.

6. National policy favoring competition should not be employed to prevent the trademark owner from protecting the value of his trademark, which preserves his own ability to compete.

7. A trademark owner's limitation of the number and location of retail outlets for his trademarked products by the use of a "no-branch outlet" or "no wholesaling" agreement is generally a permissive means that may be employed by the owner of a trademark to enhance, preserve, protect and defend the value of the trademark.

8. The public interest in fostering competition within the ambit of a single, non-monopolistic distribution system, relating to a single brand, is not so great and overwhelming in its operation that the trademark owner's interest in business self-preservation must be subordinate thereto to the point of forfeiture.[7]

[7] "In the law we only occasionally can reach an absolutely final and quantitative determination, because the worth of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed. The worth, that is, the intensity of competing desires, varies with the varying idea of the time, . . ." ". . . I have in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy." Holmes, *Collected Legal Papers*, pp. 231, 242.

The Issue of Illegal Pricefixing Is Not Effectively Present in This Case

The record below, acording to the Government's brief, indicates that retail prices for Chevrolets were higher in Orange County than in other parts of the Los Angeles metropolitan area. The Government then states:

> "Although the record does not show why there was this disparity, a *proper inference* is that it reflected a lack of competitive pressures . . . ." (Emphasis added.) *Brief for the United States*, p. 22.

We suggest that the drawing of this inference is unfounded, and that there is no support in the record for inferring that the branch location clause here in question was even as much as a contributing factor to higher prices in Orange County. Indeed, if one must grasp at straws to explain price differences, it would seem at least equally plausible to hypothecate higher costs of operation as being the cause of higher retail prices. Contrast this to the Government's argument that the branch location limitation can be inferred to have reduced the number of Chevrolet outlets which can be inferred to have caused higher prices.

The "proper inference" sought to be drawn by the Government falls rather into the categories of supposition and conjecture. A *proper* inference "is a logical deduction from facts proved, and guesswork is not a substitute therefor . . .". *Mitchell* v. *Machinery Center, Inc.*, 297 F. 2d 883, 885 (10th Cir. 1961). See also *United States* v. *L. D. Caulk Co.*, 126

F. Supp. 693, 702 (D.C. Del. 1954). As cogently stated by the New York Court of Appeals, "it is entirely true that a material fact in a civil or criminal action may be established by circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established and to exclude any other hypothesis fairly and reasonably". *Ruppert* v. *Brooklyn Heights R. Co.*, 154 N.Y. 90, 93, 47 N.E. 971 (1897). See also *Tropea* v. *Shell Oil Co.*, 307 F. 2d 757, 764 (2d Cir. 1962), *and cases cited.* In the present case, the Government seeks to convert and thus elevate a mere possibility to the status of actuality by the device of labelling the process a "proper inference".

It has been held that "the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded". *Adler* v. *Board of Education,* 342 U. S. 485, 494. The Government has not established any empiric basis for drawing the question of Orange County pricing into the inquiry and then relating it to the validity of the branch location clause as such. In two cases below and during the antecedent grand jury proceedings, the Government had ample and repeated opportunity to develop direct evidence as to the cause and effect relationship which it now urges this Court to assume or to demonstrate a basis for its position through circumstantial proof. The fact that it failed to do so in these circumstances does give rise to a pair of alternative "proper inferences": Either the Government failed to make adequate inquiry, or that inquiry was made with negative results.

But whatever may be the deficiencies in the Gov-

ernment's factual proof of "effect on price", there is a more basic and serious error in its position.

In the broad economic sense, *every* sale has an "effect on price." If *A* sells a unit of his product, *B*, his competitor, has one less unit of sales, and may well have to raise his prices to compensate for his now higher overhead burden on each unit of sale. However, this is not the type of action "affecting price" that falls within the interdiction of the Sherman Act.

Unlike General Motors, which challenges only the factual basis of the Government's price argument, *Amici Curiae* suggest that the Government is espousing a novel and curious theory—that a restriction on distribution which affects price, in the broad economic sense suggested above, violates Sherman Act inhibitions as to resale price maintenance.

The price maintenance decisions, from *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373, through *United States* v. *Colgate,* 250 U.S. 300, to *United States* v. *Parke, Davis & Co.,* 362 U.S. 29, have been concerned with an entirely different type of problem. In those cases, the supplier had used a price-fixing device in the literal sense. The substance of the agreements, their intent and purpose, were to overtly and directly affect price. The "effect on price" was direct, immediate and intentional. Similarly, in *Simpson* v. *Union Oil Co.,* 377 U.S. 13, this Court proscribed consignments as a marketing device because it found the procedure to be a cloak for resale price-fixing agreements.

It is possible that the Government is induced to create a new theoretical basis for antitrust enforcement

by the ambivalent attitude it expresses toward the franchise system itself. Despite the statements in the Government's brief that "we are not here attacking the franchise system, albeit it has anticompetitive features" and its indication that the purpose of the present litigation is to prune an encrustation from the system which "can be severed without impairing it," *Brief for the United States,* pp. 27 and 36, respectively, the Government does not accept the basic legality of franchising: "We emphasize that we are not conceding that the franchise system . . . is in fact justifiable. . . . We simply regard this broad issue as not raised by the facts of the present case." *Id.* at 37. Congress, apparently, has no doubt of the legality of the system. As is discussed below in detail, it has enacted special antitrust legislation to preserve the franchise system, an action which hardly can be attributed to a desire to perpetuate an anticompetitive practice in a vital industry.

If it be the intention of the Government to use this case as a flank attack on the franchise system as a whole, it is suggested that an ancillary effect of the attack, if successful, would be to wound innocent bystanders—those involved in trademark distribution in other industries where formal franchising is not a significant factor.

Vertical Distribution Practices Cannot Be Judged by Horizontal Conspiracy Standards

In *White Motor Co.* v. *United States,* 372 U.S. 253, this Court was asked to extend the ban against horizontal combinations among competitors to a vertical

arrangement by one manufacturer in restricting the territories of his dealers. The Court declined to apply the *per se* rule to the situation then before it, stating:

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . and within the 'rule of reason'." *Id.* at 263.

The problems inherent in the attempted application of horizontal combination tests to territorial restrictions unilaterally imposed by a manufacturer, vertically, on his dealers are further pointed out in the concurring opinion of Mr. Justice Brennan.

The Government brief states:

> "We recognize, of course, that merely to enjoin General Motors and its dealers from continuing such a conspiracy could presumably leave the company free to enforce separate vertical agreements to prevent any dealer from selling through a discount house. We believe that an order as broad as that asked in the complaint . . . could be predicated upon a finding of illegal conspiracy alone. . . . But the uncertainly whether such relief would be granted prevents us from arguing that the question whether General Motors may lawfully forbid its dealers to sell through discount houses would be mooted if the Court accepted our conspiracy contentions." *Brief for the United States*, p. 21.

Implicit in the quoted government argument is the theory of antitrust illegality offered to this Court in *White Motor* and which requires closer examination. The Government seems to be saying that since a horizontal arrangement among dealers to prohibit unauthorized branches would be illegal *per se*, and since the separate vertical agreements present in this case have the same economic impact, the latter situation should be held to be the same as the former and hence presumptively illegal. It is suggested that applying the familiar geometry textbook rule that "things equal to the same thing are equal to each other" in the area of antitrust is an untested and highly dubious procedure.

Basically, the development of the *per se* doctrine as applied to horizontal agreements arises from the fact that, by acting in concert, employing price-fixing agreements, group boycotts, horizontal divisions of markets, etc., the collective participants functioned, for antitrust purposes, as a single unit—in effect a monopoly—engaged in traditional types of anticompetitive activities inimical to the public interest. Monopolies are the antitheses of competition and competitors cannot, by private agreement, frustrate the public policy which bans monopolies as intolerable. It is suggested that this is the true source and reason for the *per se* rules.

In vertical distribution cases, analysis cannot follow the same cause, because the manufacturer of a trademarked article has a natural monopoly as to his trademark. It is a contradiction in terms to employ a legal analysis that in effect charges the trademark owner with monopolizing his own trademark.

Reducing the argument to these basic terms, *Amici Curiae* find themselves in a position parallel to that of Mr. Justice Brennan in *White Motor, supra,* who commented that "consideration of the similarities has thus far obscured consideration of the equally important differences, which serve to distinguish the practice here from others as to which we have held a *per se* test clearly appropriate." *Id.* at 266.

The substance of the Government's position in *White Motor* was that a manufacturer is not at liberty to restrict the places from which and the persons to whom a dealer will resell. This Court declined at that time to accept that theory. Instead, it invited the Government to develop and demonstrate, in an evidentiary sense, the competitive evils of the challenged distribution practices.

In the present case the Government has responded by tendering a modified legal theory—it now contends that territorial restrictions are invalid whenever they have an assumed "effect on price". In addition the Government reluctantly offers to accept a "strong presumption" buttressed by a shifting burden of proof in lieu of a *per se* rule.

Therefore it is suggested that, in legal effect, the Government's position remains substantially unchanged.

In 1958, Professor Milton Handler, addressed himself to the problem of the permissiveness of vertical restrictions:

> "What is vitally important is that in our zeal to preserve the benefits of a competitive society, we

do not kill the goose that laid the golden egg. The extreme notion that any restriction on the economic freedom of a contracting party is inimical to competition and should therefore be condemned out of hand is the quintessence of short-sightedness.

"Let me illustrate my thesis by focusing on an area in which reasonable restraints have traditionally been sustained but where they are presently under heavy fire by the Department of Justice—the familiar contracts by purchasers not to compete with their sellers. Despite the sharp divergence in the views of various members of the Supreme Court concerning the scope of the Sherman Act before the birth of the rule of reason in *Standard Oil,* there was no disagreement concerning the legality of the ancillaries. Barring their use as an instrument of monopoly power, these restrictions, if reasonably limited temporally and spatially, were universally sanctioned as incidental to a major legitimate business transaction. The Restatement of Contracts cites as an instance of reasonable restraints: 'A bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor.' Typical of such arrangements were restrictions on specified commercial uses of land or chattels by purchasers or lessees. In the marketing of goods the restraints took the form of exclusive dealing agreements, territorial restrictions and regulation of customer selection on resale of the manufacturer's wares. The courts were not blind to the immediate restraining influence of such restrictive practices.

But they recognized that by strengthening the hand of each producer in marketing his particular product, competition among all producers would be enhanced. And the public would thus obtain the advantages of inter-manufacturer or inter-brand competition.

* * * *

"With regard to the imposition by manufacturers of territorial and customer restrictions on distributors, the Justice Department takes the extreme position of *per se* illegality. Judging from the ever-increasing number of consent decrees entered of late which prevent these restrictions, the Department has not had much of a fight on its hands from those whose distribution programs it has attacked. To me this is a constant source of mystification, since the decided cases in this area are uniformly favorable to the defendants. To win on the merits, the Government would have to persuade the courts to retreat from precedent and turn back the pages of history to the Fifteenth Century when no restriction on either seller or buyer was countenanced. If we lived under that type of regime, there could be no such thing as orderly marketing of goods through the usual hierarchy of distribution. A manufactuer could not require his wholesalers to confine their sales to retailers; nor could he prevent his distributors from selling outside designated geographical territories. Title to the goods having passed, he would in so doing be restraining the trade of his customers. By the same token, wholesaler would have to be free to compete against wholesaler, wholesaler against retailer, and retailer against retailer—all in respect of the same product and

brand of a single manufacturer, and irrespective of the extent and vigor of competition at each level from other brands. While the public might derive a short-run benefit from such chaotic distribution in the form of cut-throat price competition, there would come a time when the larger companies would seek refuge in vertically integrated market outlets of their own. Their smaller competitors, of course, would not have the wherewithal to emulate their example. Inevitably, the independents would find it difficult, if not impossible, to compete effectively without the protection of marketing arrangements enabling them to channelize their wares to the consumer without costly intra-distributional warfare. Mr. Justice Douglas perceived the danger of industrial concentration through vertical integration as an alternative to the use of the requirements contracts which were outlawed in *Standard Stations;* he recognized that if manufacturers were denied the right to prescribe the orderly marketing of their wares, they inveitably would take over distribution themselves.

"The common law recognized the social justification for limited marketing restrictions, and so have the courts under the Sherman Act. There is no reason to repudiate their wisdom. Order is not synonymous with monopoly or the absence of competition. The public is amply protected by a system of distribution keyed to inter-brand competition. To insist on intra-brand competition as well is only to court short-term chaos and long range subversion of our competitive order. We can avoid this by rejecting absolutes and giving ungrudging adherence to the rule of reason."

Handler, *Recent Antitrust Developments,* 13 Record of N.Y.C.B.A. 417, 422-25, 432-36 (1958).

* * * *

"It was only a few years ago that exclusive distributorships were under frontal attack in treble damage actions. Then came *Schwing* and *Packard.* During the past year, the Federal Trade Commission, relying upon these precedents, has unqualifiedly approved such arrangements between a manufacturer and his distributors. What is more, it has refused to apply the *per se* illegal doctrine to restrictions imposed by manufacturers with regard to the customers to whom their distributors may resell. These decisions may presage a more hospitable attitude towards the rudiments of orderly marketing.

"You will recall that I have repeatedly called attention in these annual talks to the persistent attack by the Department of Justice upon the allocation by manufacturers of assigned territories to their distributors or dealers. This has been coupled with a governmental assault upon the effort of sellers to control the channels of trade through which their products may be distributed. Practices sanctioned by a long line of common law and statutory precedents have been the subject of numerous complaints. None, however, has ripened into judicial decision, the cases consistently being settled by consent decree.

"My plea for the preservation of the existing law on orderly marketing relates, of course, to vertical agreements between seller and buyer. Orderly marketing can be a euphemism for a garden variety horizontal combination in restraint of trade.

For example, the Fourth Circuit was confronted this past year with a horizontal marketing arrangement in the *Virginia Excelsior Mills* case, strongly reminiscent of that involved in the well-known *Appalachian Coals* case. A group of small manufacturers, accounting for about 25% of the national output of excelsior, decided to market their product through a common sales agency at prices dictated by the members of the combine. The court regarded the plan as a form of price-fixing and hence unlawful *per se*. *Appalachian Coals,* it asserted, was no longer law, having failed to survive 'the strong and consistent course of subsequent decisions.'

"Orderly marketing, in the sense in which I use it, encompasses exclusive distributorships granted by the seller, territorial limitations imposed on the buyer, and restrictions on the use and disposition of the purchased product. These arrangements were classified at common law as contracts not to compete ancillary to the purchase of property. The Restatement of Contracts includes among the instances of reasonable restraints 'a bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor.' The leading case at common law was the Supreme Court decision in *Oregon Steam Navigation Co.* v. *Winsor* upholding a covenant by the purchaser of a steamship not to operate it in competition with its seller on any waterway within California for a period of ten years.

"From the premise that a purchaser could be restrained from using the purchased article in

competition with his seller were derived the rulings that he could be confined to the use or sale of the product within a defined territory or inhibited from selling to a class of customers reserved by the seller for himself or assigned to other distributors. Illustrative of restraints upheld under the Sherman Act have been an agreement not to resell sugar purchased for use in the manufacture of candy and a promise by a buyer to dispose of the purchased goods in the export and not the domestic trade." Handler, *Recent Antitrust Developments,* 14 Record of N.Y.C.B.A. 318, 349-51 (1959).

Congressional Concern with and Action in This Area Has Been Adequate to Protect the Public Interest

Manufacturer-retailer relationships have been the subject of numerous Congressional inquiries, some of which have culminated in special legislative enactments. There is no other industry that has been more closely, carefully and continuously scrutinized by Congress, acting through its various committees, than the industry now before the Court. Automobiles and the distribution thereof seem to be in the category of a special ward of Congress. This is understandable, in view of the basic, quasi-public utility status of the automobile industry, the magnitude of the industry, and its resultant importance to the nation's economy.

The dealer location provision of the franchise agreement under consideration has been submitted to Congressional review and scrutiny on many occasions. Congress has had repeated opportunity to appraise

the competitive effects of this clause and dealer operations thereunder.[8]

Amici Curiae do not represent that the dealer location clause in issue here resulted from Congressional mandate or that it possesses specific Congressional approval. The significance is rather two fold: (1) That Congress has had the opportunity to speak out in protest, if such were warranted, and nowhere in the prolix record of Hearings, Reports and debates appears criticism of the dealer location clause as anti-competitive in operation, and (2) that Congress has repeatedly demonstrated by the enactment of remedial legislation its interest in and capacity to deal with the special problems of automobile distribution.

It is elementary that Congress is the constitutional architect of national economic policy. Congress alone, acting through its network of committees, is equipped with the facilities, including staff efforts, to elicit and digest the quantities of data and testimony which are prerequisite to a sound determination as to rival economic courses.

A consideration of S. 3946 84th Congress (1956)—not enacted by Congress—affords an additional and compelling reason why this Court should hesitate to change the ground rules for automotive marketing at this time. S. 3946 was introduced by Senator Monroney and eight other senators in May, 1956, following a survey and study commenced the prior year. Although not enacted into law (S. 3879 was enacted as

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8 Hearings, Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 84th Congress, 2nd Session on H.R. 11360 and S. 3879, Serial No. 26, pp. 507, 548.

the preferred solution to the problem of the termination of dealer franchises) Section 17 (a), Subsection 2 of the unsuccessful measure is especially pertinent to the economic arguments of the Government in this litigation, and is excerpted as follows:

> "Sec. 17. (a) For the purposes of section 5 it shall be deemed an unfair method of competition and an unfair act or practice in commerce—
>
> * * * *
>
> "(2) for any dealer knowingly to sell any new motor vehicle produced by any such manufacturer to any person other than another dealer of such manufacturer, for resale by such person as a new motor vehicle in competition with other dealers of such manufacturer, without first affording such manufacturer an opportunity to repurchase such motor vehicle within a reasonable time after its receipt by such dealer for a sum equal to the actual price paid by such dealer for such motor vehicle (including the cost of delivery thereof to the place of business of such dealer), if such manufacturer has placed in effect a plan providing for such repurchase;"

Under the discussion following the text of the proposed Measure there appears:

> "In general the bill provides that certain practices by automobile manufacturers and automobile dealers are "unfair methods of competition" and "unfair acts or practices in commerce" and places these practices under the scrutiny of the Federal Trade Commission."

The "unfair trade practices" specified are:

* * * *

"(2) the "bootlegging" of automobiles by dealers without first affording the manufacturer an opportunity to repurchase, if the manufacturer sets up a plan to repurchase such automobiles;"

* * * *

Brief History of Bill

This bill is the result of the most extensive study of the automobile industry ever conducted by Congress. The study was commenced in March 1955. The subcommittee staff made a comprehensive background survey from that date until January 1956 at which time hearings commenced. During this background survey, the subcommittee members and the staff interviewed hundreds of automobile dealers, representatives of automobile manufacturers, and other interested groups, compiled data from previous studies by the Federal Trade Commission and the Department of Justice and sent a questionnaire to the approximately 40,000 enfranchised automobile dealers of America. Nearly 20,000 of the dealers polled replied, and they favored Federal study or legislation with regard to their problems by a margin of 7 to 1. The result of this questionnaire, broken down by States, is available in the subcommittee's January 19 report.

Subcommittee hearings began January 19, 1956. All segments of the industry and witnesses from consumer groups and the public were heard. S. 3946 was introduced May 28, 1956, and again witnesses were heard. Modifications were con-

sidered and some were adopted. Hearings closed June 21, 1956.

Objections by the Federal Trade Commission, the Department of Justice, and the Department of Commerce to the bill as originally introduced are included as an appendix to this report. It should be noted that many of their objections have been met. One of the primary objections was directed toward the requirement that manufacturers effectuate a reasonable plan for the repurchase of dealers' excess stock of cars. The bill has been modified to make the effectuation of such a plan optional with the manufacturer.

During the course of the study, numerous reforms were voluntarily made by automobile manufacturers in their relations with dealers. The provisions of this bill closely parallel these reforms. It consolidates the recent gains made in factory-dealer relations without requiring any major revisions of present marketing patterns. It would require all manufacturers and dealers to largely observe minimum "ground rules" and thus prevent the return to destructive and abusive practices for competitive advantage.

Paragraph Analysis of S. 3946

* * * *

Paragraph (2): This provision is primarily directed at the practice of "bootlegging". It recognizes the right of the manufacturer to require its dealerships to perform a retail (rather than a wholesale) function, if the manufacturer shoulders the responsibility of its own production decisions by offering to repurchase, at delivered

cost, dealers' excess stocks of cars. It in no way restricts the right of a dealer to sell the car at any price. Only when the dealer assumes the role of wholesale distributor by knowingly selling to others whose purpose it is to resell these cars as new motor vehicles, in competition with other enfranchised dealers of the same manufacturer, is this provision violated—and then, only if the manufacturer has set up a reasonable system for repurchasing these cars at the dealers' delivered cost. In other words, before assuming the role of a wholesaler, the dealer must offer the cars to the factory, at the dealer's delivered cost, if, and only if, the factory has agreed in advance to repurchase at that price.

Mr. Harlow H. Curtice, president of General Motors, in his testimony before the subcommittee urged legislation along these lines. He described it as "a proposed new clause which in effect required the dealers to offer cars back to us at dealers' cost before disposing of them in bootleg channels." He also said "such a clause would have the effect of minimizing possible overproduction and maldistribution. The dealer would be careful to order only cars that he could expect to sell at retail. The manufacturer's representatives in the field, responsible for distribution, would avoid maldistribution in order not to be in the position of repurchasing or refusing to repurchase cars. The factory would schedule production carefully to avoid overproduction."

Furthermore, General Motors, more than a year ago agreed, on its part, to accept new cars back at dealer's cost. This provision would require dealers to comply with such a plan, if it is offered,

> before entering their excess stocks in bootleg channels. If the dealer's manufacturer offers no such plan, the paragraph is completely inoperative. In other words, its operation is completely optional from the standpoint of the manufacturer.[9]

The fact that this measure failed of enactment does not detract from its significance as being reported out to the Senate by the full Committee on Interstate and Foreign Commerce. No repudiation is implicit in subsequent Congressional action in approving another and rival measure dealing with the identical problem.

Under all of the legislative circumstances detailed above, it seems most inappropriate at this point for the Executive branch of government, acting through the Department of Justice, to urge this Court to adopt a rule of law and a distribution philosophy that is diametrically opposed to that promulgated and approved by the above Senate Committee after exhaustive investigation. An appropriate regard for the labors of the legislative branch of Government, although falling short of a clear expression of Congressional will, would suggest that the change in the "ground rules" urged by the Department of Justice in this case be held in abeyance.

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[9] Hearings, Automobile Marketing Practices, Subcommittee of the Committee on Interstate and Foreign Commerce, U.S. Senate, 84th Congress, 2nd Session, Appendix to Digest, p. 125 et seq.

The Decision in This Case Should Be Restricted to Its Facts

The instant case should not be treated as capable of originating a general rule regulating the scope of limitations on customers which may be imposed by a manufacturer. It deals with a much narrower issue—the right of General Motors to impose restraints upon its franchisees in the special context of the automotive industry. The Government acknowledges that "plainly, the structure of the automotive industry is far from the competitive norm." *Brief for the United States*, p. 23. It further characterizes the industry as one "dominated by three firms, which in 1960 accounted for 84.2 percent of all domestic new-car sales," where "Chevrolet . . . alone accounts for some 30 percent of . . . domestic new car sales," and indicates that "in the Los Angeles area alone General Motors in 1960 sold 93,333 Chevrolets to its dealers, for more than $100,000,000." *Id* at pp. 23, 24.

Amici Curiae are representative of a variety of industries much closer to the competitive norm. Their fields of endeavor are characterized by lack of concentration, absence of firms controlling large segments of the market, and sales figures dwarfed by those of automobile marketing. In these more typical markets, a large number of suppliers are engaged in competition for consumer preference. Their products are sold through a wide variety of wholesale and retail channels, and their customers almost universally carry other and competing lines.

In these more representative industries, some manufacturers impose limitations upon their customers, but the degree of control exercised by General Motors over its franchised dealers is virtually unknown. However, if this Court discerns any taint of illegality associated with that aspect of the General Motors franchise agreement here under attack, and does not specifically restrict its decision to the facts of the automotive industry, the implications of this decision may reach far afield, affecting manufacturers, like *Amici Curiae*, who must operate in industries where there are no dominant sellers, where franchising is not a way of life, and where the entire competitive structure is different.

As stated by Mr. Justice Stewart, dissenting, in *Simpson* v. *Union Oil Co.,* 377 U.S. 13, 29, "we cannot be blind to the fact that commercial arrangements throughout our economy are shaped in reliance upon this Court's decisions elaborating the reach of the antitrust laws." While the genesis of a rule may lie in the unique and economically abnormal field of automotive distribution, the principle announced, if unrestricted at its source, may be applied with a broad brush to the entire area of distributive relationships.

Additional elements which contribute to making automobile marketing atypical are the Automobile Dealers' Day In Court Act, 70 Stat. 1125, 15 U.S.C. Sec. 1221; the Automobile Information Disclosure Act, 72 Stat. 325, 15 U.S.C. Sec. 1231, which requires price pre-ticketing of new automobiles (a practice at times suspect when utilized by vendors in other industries); the problem of used car trade-ins; the importance of

post-sale service and maintenance; the difficulty of market entry at all levels and the frequent and intensive investigations by Congress of automobile marketing practices.

Therefore, *Amici Curiae* suggest to the Court that it would be appropriate to treat the issues here as *sui generis* to the automobile industry, without general application to other modes and methods of distribution.

Conclusion

The rule of law in a free society rests in part upon an implicit covenant between the Government and its subjects that a tradition and convention of the business culture should not be proscribed without a clear showing of evil. It cannot be said in this case that the Government, in attacking the legality of a commonplace and prosaic condition of sale, has in any way sustained the burden of demonstrating that the business use of this condition or similar conditions is in any way harmful or injurious. Two respected judges of the Court below have failed to find evil, harm or injury in the conditions of sale embodied in the contract here challenged.

The drastic change in the law as it relates to distribution urged by the Government in this case should not be effectuated without a clear showing of manifest abuses together with a careful consideration of the available alternatives. The Government has failed to discharge its burden as to the first—the existence

of abuses, and it is altogether silent as to the second of its burdens—that of a consideration of the effect of the ruling it seeks from this Court.

Respectfully submitted,

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